

THE ROYAL  
BOROUGH OF



KENSINGTON  
AND CHELSEA

# THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA

## REMEDIATION STRATEGY



November 2004

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## CHAPTER ONE

### INTRODUCTION

In 2002, the Royal Borough (referred to as 'we' in this document) published its Contaminated Land Inspection Strategy. At the time, we explained we would produce a Remediation Strategy, as a sequel, to accompany the Inspection Strategy. Together, these documents comprise the Royal Borough's overall Contaminated Land Strategy.

In this chapter, we briefly look at the regulatory framework behind the Contaminated Land Regime and explain what contaminated land is. We also re-visit the Council's Inspection Strategy, and introduce the main tasks that need to be undertaken to remediate contaminated land.

If the law affects you, you should seek your own advice or examine the relevant statutes.

#### **Regulatory Framework**

In April 2000, new regulations were introduced for dealing with contaminated land under Section 78 of the Environmental Protection Act 1990. These regulations brought into operation Part IIA of the Environmental Protection Act 1990 and were accompanied by Statutory Guidance (DETR Circular 02/2000, hereby referred to as the Guidance), on how to identify and remediate contaminated land, apportion liability and how to recover the costs of remediation.

It should be borne in mind that the majority of remediation work in the Borough is carried out as part of the redevelopment process and therefore is controlled by means of agreements prior to Planning consent or through conditions imposed when consent is granted. This document relates to remediation undertaken through Part IIA of the Environmental Protection Act, and not through the Planning Regime. For further information on this, please contact the Environmental Quality Unit on 020 7341 5683.

#### **Contaminated Land – What is it?**

To class land as officially 'contaminated', the Local Authority, which acts as the enforcing authority<sup>1</sup>, must have identified whether substances present in, on, or under the land, may cause:

- significant harm (as defined in the glossary);
- a significant possibility of such harm;
  
- pollution of controlled waters (as defined in the glossary);
- or the likelihood of pollution of controlled waters .

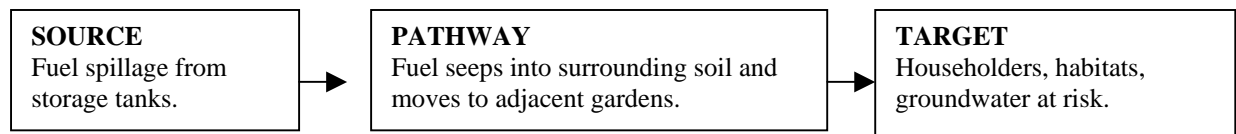
A risk-based approach is used to identify contaminated land. A site is assessed on the current use of the land and the prevailing circumstances. To be considered a risk, there must be a source of contamination. This source must be finding a pathway to affect the underlying ground or watercourses and/or must be causing harm or have the potential to cause harm to people, building materials, watercourses or the natural environment (the term used for these is receptors and collectively they are referred to as the target). It therefore involves linking cause and effect. This is technically referred to as the source-pathway-target relationship.

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<sup>1</sup> Unless the site has been classed as a 'Special' site (as defined in the Glossary) in which case the Environment Agency (EA) will be the 'Enforcing Authority.'

For land to officially be deemed ‘contaminated land’ a linkage must exist between the source, the pathway **and** the target. If any one of these is absent, then it cannot legally be classed as contaminated land.

**Fig.1 Example of a pollutant linkage**



**The Inspection Strategy**

The Guidance requires the Council to publish an Inspection Strategy to show how we identify land in the Borough where contamination is causing unacceptable risks to human health and the wider environment. In 2002, we published ours and since then we have investigated sites from a provisional list indicating a possible high risk of contamination. The initial investigations have now progressed to physical inspections and sample gathering.

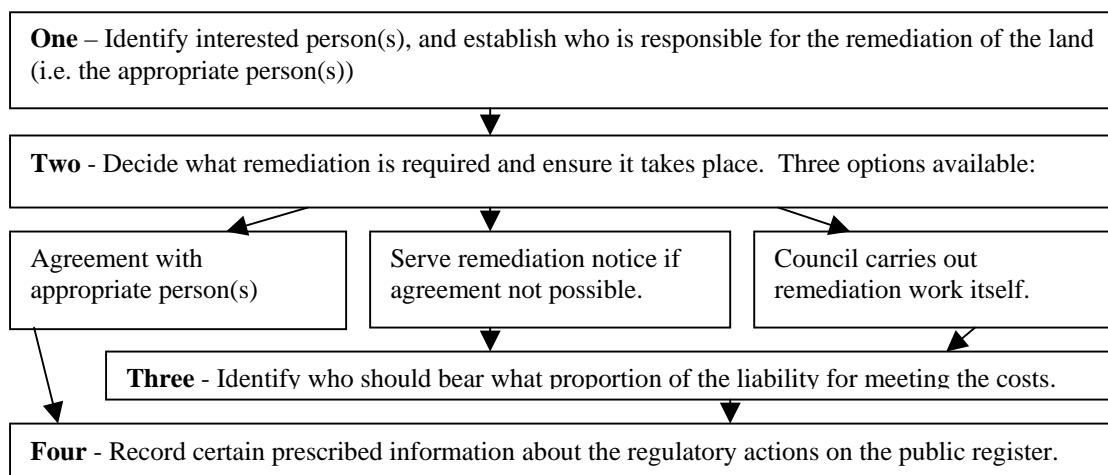
There are several stages involved in the identification process before a site can officially be classed as ‘contaminated.’ For a summary, refer to Annex One. For more detail, please contact the Environmental Quality Unit (tel: 020 7341-5760/ 5271/ 5683) for a copy of the Royal Borough’s Inspection Strategy.

**Remediation**

Identifying contaminated land however is only the first part. Once it has been correctly identified, the risk needs to be dealt with and a programme of remediation must be undertaken. It is important to understand that the purpose of remediation is to reduce any significant risks posed by contaminated land; it is not necessarily to decontaminate the land. In other words a programme of remediation may not eliminate all possible future risks or remove all the pollutants.

We have produced this Remediation Strategy to make it easier for residents and businesses to understand what the process of remediation might entail. It sets out the steps that will need to be taken to reduce and ultimately minimise the risks posed once a site has been designated as ‘contaminated’. There are four main tasks to undertake when looking at each site: (a slightly more detailed timetable can be found on page 7).

**Fig.2 Main tasks for remediating land**



The following chapters look at each of these tasks in detail.

## CHAPTER TWO

### TASK ONE - ESTABLISHING THE APPROPRIATE PERSON

In this chapter we look at what is meant by the term ‘appropriate person(s)’, and what information the Council can supply to them, once they have been identified.

For any piece of land identified as being contaminated, we will try to establish:

- (a) who the owner of the land is;
- (b) who appears to be the occupier of the land; and,
- (c) who appears to be an appropriate person to bear responsibility for any remediation action which might be necessary.

#### **What is an appropriate person?**

This is any person, or persons, who caused, or knowingly permitted, the contaminating substances to be in, on or under the land. It is they who will have to undertake the remediation and meet its costs. They are referred to as a ‘Class A Person.’ If however it is not possible to find this person, responsibility passes to the current owner or occupier of the land, who is known as a ‘Class B Person.’

Initially, it may not be possible for Council officers to identify (with certainty) who falls within each category. We will only be able to act on information that is available at the time, though all decisions will be reviewed as further information is obtained.

Once identified, we will write to the ‘appropriate persons’ informing them that the land has been determined ‘contaminated’. It will also be necessary to tell the Environment Agency.

If at any stage it becomes apparent that another ‘appropriate’ person exists, these will be included, either as well as, or instead of those previously identified. Where this happens, the Council will notify all affected persons in writing.

Issuing any of these notices signifies the start of the consultation process on what remediation might be appropriate.

#### **Information for appropriate persons**

To help all appropriate persons understand why we are interested in them and the site, the Council will provide the following:

- (i) a copy of the written record of the determination made by the Council;
- (ii) information on the availability of site investigation reports and;
- (iii) an indication of the reason why particular persons appear to be appropriate persons.

The Council will also inform the appropriate persons about the tests for ‘exclusion’ from and ‘apportionment’ of liabilities – see Chapter Three for further information. It describes the information we will need if anyone wishes to make a case for ‘exclusion from liability’, or for a particular ‘apportionment’ of liability.

## CHAPTER THREE

### TASK TWO – IDENTIFYING APPROPRIATE REMEDIATION

Where land is identified as being contaminated we have a duty to see that appropriate remediation is undertaken. This chapter explains what is meant by the term ‘appropriate remediation’ and the three different ways that this can be achieved, either by (i) voluntary agreement or agreed remediation (see page 5); (ii) serving a remediation notice (page 6); or (iii) by the Council undertaking emergency remediation (page 8). Page 7 indicates how long the process may take.

#### **What is appropriate remediation?**

This means that any remediation undertaken should result in the land being ‘suitable for use.’ This ensures that the land is no longer contaminated in relation to its current or proposed use and that the effects of any significant harm, or pollution of controlled waters that has occurred, are remedied. In many situations the level of contamination is reduced to the point at which no significant risk remains. This does not necessarily mean that all traces of contamination are removed, and in some situations the contamination will be left where it is, but permanently contained, so that it is prevented from doing any further harm i.e. it is detached from all pathways.

If land is going to be redeveloped, then the appropriate person might need to carry out remediation on a broader basis, so it is suitable for a range of ‘future’ uses. If redevelopment is intended, please contact the Environmental Quality Unit (tel: 020 7341-5760/ 5721/ 5683), for advice and a copy of ‘Contaminated Land – a guide to help developers meet planning requirements.’

To establish the standard, under the Contaminated Land Regime, to which the relevant land, or waters, as a whole should be remediated, each ‘significant’ pollutant linkage must be considered separately. As mentioned in the introduction on page 1, a pollutant linkage is the relationship between the contaminant (the pollutant), its pathway(s) and possible receptors. A ‘significant’ pollutant linkage is a pollutant linkage that forms the basis for a determination that a piece of land is contaminated. These significant pollutant linkages will therefore already have been identified and must now be considered individually.

Using the best practicable techniques, a remediation package must ensure that on completion:

(a) the linkage is no longer a significant pollutant linkage, by either:

- removing or treating the pollutant and/or;
- breaking or removing the pathway and/or;
- protecting or removing the receptor.

(b) the effect of any significant harm or pollution of controlled waters which is resulting, or has already resulted from the significant pollutant linkage is remedied.

As mentioned above, there are three methods of deciding what and how remediation should be undertaken:

- by agreement with the appropriate person(s);

- if agreement is not possible, by serving a remediation notice on the appropriate person(s) or,
- by the Council carrying the work out itself. It will then seek to recover any costs from the appropriate person(s).

**(i) AGREED REMEDIATION**

It is the Government’s intention that wherever practicable, remediation should proceed by agreement rather than by formal action by the Enforcing Authority. The authority and the person(s) who will carry out the remediation should identify by mutual agreement the particular remediation actions that would achieve remediation to the necessary standard.

The remediation can therefore be carried out *without* a remediation notice being served. The agreed remediation actions must however be described in a published ‘*remediation statement*’ (see below for explanation). This may apply where:

- the land is already subject to development proposals;
- the appropriate person brings forward proposals to develop the land in order to fund necessary remediation;
- the owner of the land has a programme for carrying out remediation on a number of different areas of land for which he is responsible, and aims to tackle them in order of environmental priority, or;
- the appropriate person wishes to avoid being served with a remediation notice.

However if we are not satisfied that an appropriate standard of remediation would be achieved by the remediation actions proposed, we will negotiate with the person who made the proposals to provide a revised and satisfactory remediation scheme. If this cannot be achieved, then the Council will serve a remediation notice. Page 7 gives an indication of the time such action may take.

Throughout the process of identifying the appropriate remediation scheme, we will keep under review whether there is a need for urgent remediation to be carried out.

**What is a Remediation Statement?**

If no notice is to be served, then a remediation statement must be prepared. Section 78H(7) of the Environmental Protection Act 1990 requires the following information to be incorporated:

- the actions which are being taken, have been taken, or are expected to be taken to bring about the remediation;
- the name and address of the person who is doing, has done, or is expected to do the tasks required in each of the actions;
- and the periods within which each of those actions is being or is expected to be completed.

Ultimately certain additional information is required before the statement is entered on the Contaminated Land Register. This information relates to the type of harm, the substances in question and the current use of the land that has been declared contaminated –page 11 gives further details on what should be included.

Details of the remediation statement will then be entered on the Council’s

Remediation Register, which is held in Environmental Services at 37, Pembroke Road London W8 6PW, and can be viewed by the public during normal office hours.

If the person who is required to prepare and publish the remediation statement does not do so, we have the powers to write the statement ourselves. This applies when a reasonable time (21 days) has elapsed after the date that we could have served a remediation notice, but previously decided not to because remediation was taking place, or was likely to take place, without the serving of a notice.

If we do decide to write the Statement ourselves, details from it will be included on the Register and we are entitled to recover any reasonable costs incurred from the person who should have prepared and published it.

### **(ii) SERVING A REMEDIATION NOTICE**

Where appropriate remediation is not being carried out, or where agreement cannot be reached on the actions required, under section 78E of the Environmental Protection Act 1990 we have a duty to serve a remediation notice. This notice will specify the particular remediation actions that must be carried out and the times within which they must be done (see page 7 for an indication of the time such action may take).

### **Consultation**

Before we serve any remediation notice under section 78H(1), we will make reasonable endeavours to consult the following persons:

1. the person on whom the notice is to be served (appropriate persons);
2. the owner of the land to which the notice would relate; and,
3. any other person who appears to us to be in occupation of the whole or any part of the land.

In addition to the consultation specifically required, we will also carry out a wider process of discussion and consultation. This will cover:

- whether the land should in fact have been identified as contaminated; this question might be re-visited, for example, in cases where the landowner or the appropriate person(s) has additional sampling information;
- what would need to be achieved by the remediation, in terms of the reduction of the possibility of significant harm being caused, or the likelihood of the pollution of controlled waters and in terms of the remedying of any effects of that harm or pollution; and,
- what particular remediation actions would achieve that remediation.

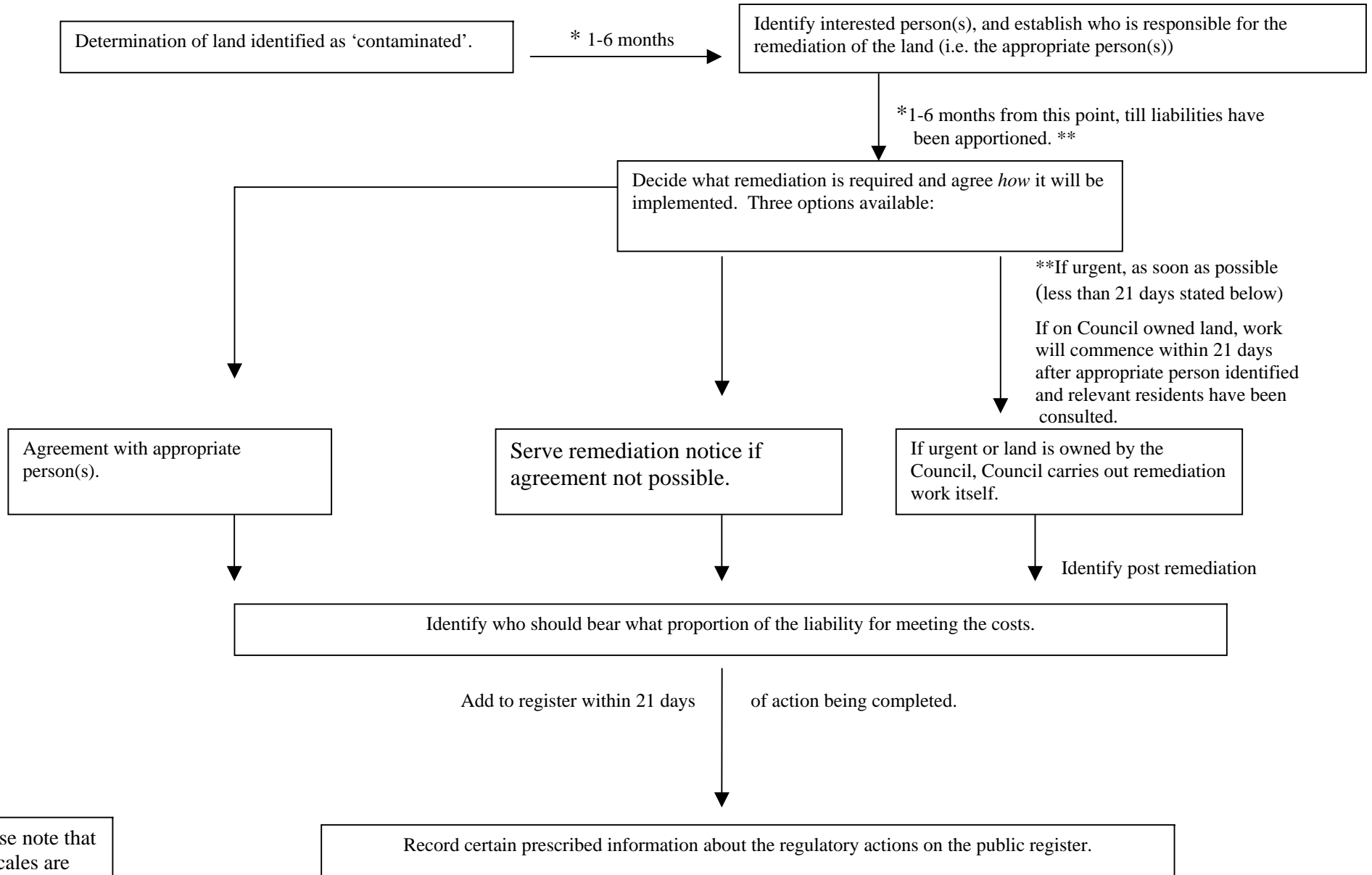
This wider process of discussion may also help to identify opportunities for agreed remediation, which can be carried out without needing to serve a remediation notice.

### **Granting of rights**

We will also need to consult on the rights that may need to be granted to the recipient of any remediation notice, to entitle him to carry out the remediation. For example, where the appropriate person does not own the contaminated land, he may need the consent of the owner of the land to enter it. Any person whose consent is required has to grant, or join in granting, the necessary rights. He may then be entitled to compensation. See annex 2 for further information on compensation for rights of entry. The remediation notice will be served at least three months after the date of notification to the person(s) concerned to allow for consultation and any formal agreements to be made.



**Estimated timetable for action**



\* NB. Please note that these timescales are indicative.

It should be noted that consultation is not a requirement in cases of urgency, and in these circumstances the three month period referred to in the previous paragraph will not be provided. When we consider that serving a remediation notice in this way would not result in remediation happening soon enough, under section 78N of the Environmental Protection Act 1990, we may decide to carry out the remediation ourselves. The authority has the power to do this if:

- (a) there is imminent danger of serious harm or serious pollution of controlled waters being caused (see below for further details); and
- (b) it is necessary for the authority to carry out remediation itself to prevent that harm or pollution.

Wherever (except in urgent cases) the complete remediation scheme cannot be specified in a single remediation notice or remediation statement, and needs to be phased, the process of consulting and determining what particular remediation actions are required will need to be repeated for each such notice or statement.

### **What will the Remediation Notice say?**

Section 78E(1) and (3) of the Environmental Protection Act 1990 and Regulation 4 of the Contaminated Land Regulations 2000 specify the information that the notice should include. It must incorporate information about the contaminated land, what kind of remediation is to be carried out and by when, who the appropriate person is and the rights of appeal against the notice, as set out on page 11.

Where there are two or more appropriate persons for remediation action, we can serve a single remediation notice on all of those persons.

As well as serving the remediation notice on the appropriate persons, we will send a copy to:

- (i) any person whom we have consulted about the granting of rights over land or water and
- (ii) the Environment Agency.

Details of the notice will also be placed on the Council's Remediation Register.

### **Appeals against a remediation notice**

Under section 78L of the Environmental Protection Act 1990, any person who receives a remediation notice has twenty-one days within which he can appeal. If the notice was served by us then the appeal must be made to the magistrates' court. If an appeal is made, the remediation notice is suspended until final determination, or abandonment of the appeal. Details of the appeal will be kept on the Register.

If the notice is suspended, we will consider whether it will be necessary to carry out urgent remediation ourselves. In these circumstances we will only need to prepare and publish a remediation statement if the remediation has not already been described in the original remediation notice. We will then consider whether to seek to recover 'reasonable' costs, though this may be affected by the decision in the appeal.

**(iii) URGENT REMEDIATION ACTION.**

If it appears to us that there is imminent danger of serious harm, or serious pollution of controlled waters being caused, as a result of a significant pollutant linkage that has been identified, section 78N of the Environmental Protection Act 1990, allows us to carry out urgent remediation.

The Enforcing Authority can decide at any time that urgent remediation is needed. It is likely that any remediation action carried out on an urgent basis will only be a part of the total remediation scheme for the relevant land or waters, as not all the remediation actions will need to be carried out urgently.

If we are satisfied that there is a need for urgent remediation, then there would be no need for prior consultation or a three month interval between the notification to the appropriate person and the serving of the remediation notice.

These circumstances may also apply if we cannot readily identify any appropriate person(s) on whom to serve a remediation notice. They may also apply if we consider that urgent remediation is needed and we have already specified the necessary remediation actions in a remediation notice, but the requirements of the notice have been suspended pending the decision in an appeal against the notice (as mentioned above).

If we, as the Enforcing Authority carry out any urgent remediation, we will prepare and publish a remediation statement describing the actions we have carried out. We will then consider whether to seek to recover from the appropriate person, the reasonable costs we as the Enforcing Authority, have incurred in carrying out the remediation.

We will recover costs wherever possible. By refusing to undertake remediation either voluntarily or after the serving of a notice, the appropriate person will still be liable for the costs, even if the Council carries out the remediation initially. However, in deciding whether to recover costs, we will have regard to any hardship the recovery might cause to the appropriate person. If we do decide to proceed with recovery, and we decide to do so immediately, action will need to be taken in the County or High Court, if payment is not made. If we decide to postpone recovery, we will safeguard our right to cost recovery by imposing a charge on the land in question. We would do this by serving a charging notice.

**Enforcement procedures on site**

In all cases where the Council's officers visit sites as part of the remediation process they will identify themselves by showing a warrant card and may bring with them any other persons who may be needed to assist them in their duties. They will take all precautions necessary to safeguard the Health and Safety of themselves and anyone accompanying them, and may insist that others attending the site also observe their Health and Safety responsibilities.

## CHAPTER FOUR

### TASK THREE - APPORTIONING LIABILITIES

This chapter briefly identifies the stages involved in determining liabilities i.e deciding who is responsible for what and what percentage of the remediation costs should they pay. This is not a straightforward process. More detailed information can be found in Annex two.

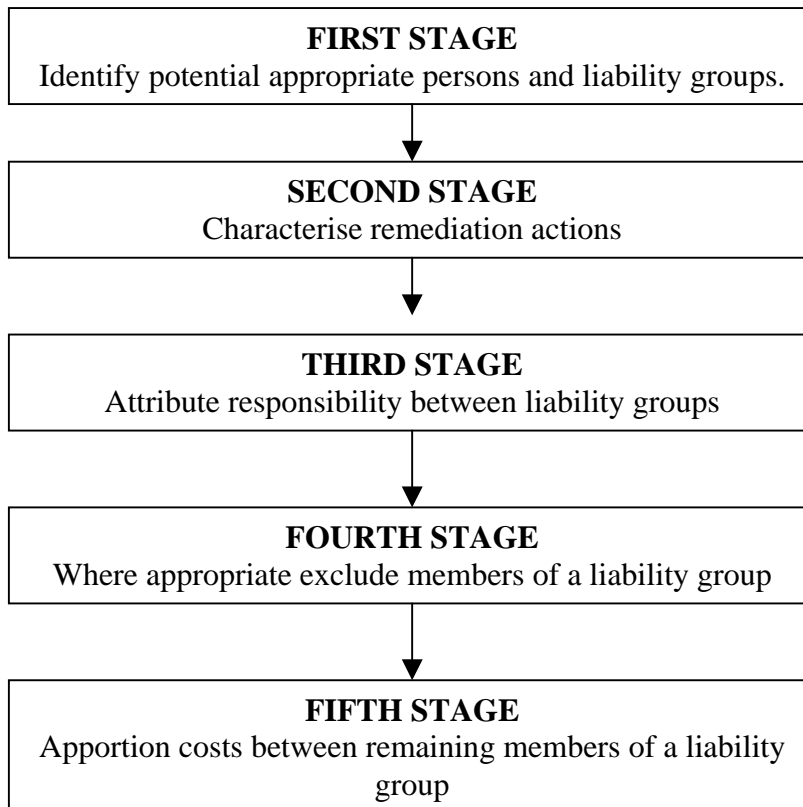
#### Procedure for determining liabilities

For most sites, the process of determining liabilities will consist simply of identifying either a single person (an individual or a corporate organisation) who has caused or knowingly permitted the presence of a single significant pollutant; or alternatively the owner of the site. The history of some sites however may be more complex, and consequently this makes the process more complicated.

A succession of different occupiers and industries, or a variety of substances may all have contributed to the land being determined 'contaminated'. Numerous separate remediation actions may be required, and these may not correlate neatly with those who are to bear responsibility for the costs. The degree of responsibility for the state of the land may vary widely.

Determining liability for the costs of each remediation action can be very complex. There are five stages that we, as the enforcing authority, must follow to determine which appropriate persons should bear what responsibility for each remediation action.

**Fig.4 Stages for identifying liability**



### **Agreements on Liabilities**

Annex Two explains more about the stages outlined above. However, it may be possible for two, or more, appropriate persons to agree between themselves the basis on which they think costs should be paid or split between them.

For this to work, without having to go through all of the above procedure, we must be provided with a copy of the agreement, and all parties must confirm that they are happy with it and do not wish to challenge it. We will then allocate liabilities between those parties so as to reflect the terms of the agreement. This allocation may differ from that which might have resulted from the normal processes of exclusion and apportionment.

However, we will not do this if it has the effect of increasing the costs to be borne by the Council. In these circumstances we would disregard the agreement and follow the five stage process in the diagram above.

### **Once costs have been apportioned**

Once the costs of each remediation action have been apportioned, and before proceeding to serve any remediation notice, we will consider each apportionment further. Specifically, we will consider if there are reasons why any of the appropriate persons should not be required to meet the full share of the cost of carrying out the remediation actions which have been apportioned to him. Chapter E of the DETR Circular 02/2000 considers this in more detail.

## CHAPTER FIVE

### TASK FOUR - THE CONTAMINATED LAND REGISTER

Every local authority in England is obliged to keep a Contaminated Land Register. This chapter specifies some of the information relating to the remediation of land that the register must contain.

Section 78R of the Environmental Protection Act 1990 specifies that every local authority must maintain a register. Schedule 3 of the Contaminated Land Regulations 2000 gives exact details of what the register should contain. Below is a list of the main items.

#### **Remediation notices**

The register does not need to include an actual copy of the remediation notice, only certain details. These details include:

- (a) the name and address of the person who has had the notice served on them;
- (b) the location and extent of the contaminated land that the notice relates to;
- (c) the significant harm or pollution of controlled waters that has resulted in the land being determined 'contaminated';
- (d) the substances that have resulted in the land being determined 'contaminated', and what, if any of the substances have escaped from other land;
- (e) the current use of the contaminated land in question;
- (f) what each appropriate person is to do by way of remediation and the periods within which they are required to do each of the things and
- (g) the date of the notice.

#### **Appeals**

The register will include any appeal that has been made against a remediation notice or a charging notice and any decision on such an appeal.

#### **Remediation statements**

For remediation statements, the register must include:

- the significant harm or pollution of controlled waters that has resulted in the land being determined 'contaminated';
- the substances that have resulted in the land being determined 'contaminated', and what, if any, of the substances have escaped from other land and
- the current use of the contaminated land.

Before including all information on the register, we will consider whether that information should be excluded on the basis that its inclusion would be against the interests of national security or the information is commercially confidential.

The Royal Borough's Contaminated Land Register is kept at our offices at 37 Pembroke Road, London, W8 6PW. It can be viewed during office hours by ringing 020 7341 5683 and making an appointment.

## CHAPTER SIX

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### FOLLOW UP ACTION

Our role does not end once the remediation statements have been written, and any notices have been served. This chapter briefly explains what happens after this.

We will consider if the remediation actions described in the remediation statement or notice have been carried out adequately and satisfactory. We will also need to decide whether any further remediation is required. This even applies where the completed remediation actions form only a single phase of the overall process of remediation of the relevant land or waters. If we decide that further remediation is appropriate, we would repeat the consultation procedures carried out previously, and identify appropriate remedial actions. A remediation notice would then be served.

#### **Notifications of ‘claimed remediation.’**

Once a person has carried out remediation, whether it was required by a notice or a statement, he/she will need to contact us and provide us with particular details of the remediation. The owner or occupier of the contaminated land is also entitled to notify us. If we receive any notification of this kind, we will be under a duty to include on our register prescribed details of the remediation which it is claimed has been carried out.

Please note that this entry on the register cannot be taken as a representation that the entry is accurate with respect to what is claimed to have been done, or the manner in which it has been done.

#### **Signing off**

There is no formal ‘signing off’ procedure, in other words there is no certificate of completion issued, or endorsement of a validation report. This is because the local authority is not in a position (legally) to be certain of the work carried out and its effectiveness. However, we will write to the appropriate person and confirm the position with respect to whether any further enforcement action might be necessary. Where a remediation notice has been served, and appears to have been complied with, this could confirm that we see no grounds, on the basis of available information, for further enforcement action. Where a notice has not been served, we might confirm that it will not be necessary to serve a remediation notice, which would be necessary if appropriate remediation had not been carried out.

#### **If a remediation statement has not been followed**

If a remediation action described in a remediation statement is not carried out in the manner and within the time described, we will consider whether it is necessary to serve a remediation notice. If it is, we may serve it without further consultation, provided that the remediation actions specified in the notice have previously been the subject of consultation with the person(s) in question.

#### **If a notice is not complied with?**

If a remediation action specified in a notice is not carried out within the time required, we will consider whether to prosecute the appropriate person who failed to comply with the notice (Section 78M(3) of the Environmental Protection Act 1990). We will however consult the appropriate person before actually taking action, as there may be an opportunity to avoid prosecution by carrying out the requirements of the notice.

## CHAPTER 7

### DEALING WITH COUNCIL-OWNED LAND

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This chapter sets out how land will be dealt with, that has been deemed ‘Contaminated Land’ and is owned by the Council.

Just like anyone else, as landowners, the Council has a duty to make its land suitable for its current use. We will want to do this in consultation with the occupiers of the land, because even though they will not own it, they will live, work or play on it, and therefore the land will be important to them.

As soon as the site has officially been declared ‘contaminated’, we will write to all parties that we consider may be affected, and invite them to a meeting, so that we can continue to keep them informed of what is happening. We will explain why the land has been classed as contaminated, what contaminants have been found, and why they concern us.

We will then talk about remediation and how we can minimise the risks currently posed. This part of the meeting is therefore likely to be theoretical. We will not have the answers at this stage.

The second stage of the process will be for the Council to assess what remedial work is needed and in many cases we will commission an environmental consultant who will devise a remediation scheme to deal with the significant pollutant linkages that have been identified. These consultants will be appointed following a strict tendering process. For all sites, we will use environmental consultants, who will have the appropriate qualifications and accreditation, so that we can try to ensure a consistently high standard of remediation for all council owned sites. We will ask them, or the contractors whom they employ, to provide the following information:

- detailed method statements about how they propose to carry out the remediation;
- a risk assessment that shows all aspects of the remediation have been considered;
- an estimation of how long the remediation will take to complete and
- the costs of each scheme.

We will then review the proposed options. It may not be possible to use the same consultants for each site. Every time we identify a site as being ‘contaminated’ we will have to consider all quotes submitted, and a consultant appointed on a previous occasion, may not necessarily put forward the best package each time we invite tenders. In addition, different consultancies may have different areas of expertise.

When we have chosen what we consider to be the best option, we will meet again with the people invited to the earlier meeting, and discuss with them what we aim to do. We will listen to all comments and suggestions made and after the meeting will try to incorporate them into the remediation scheme. See page 7 for an indication of the time this is likely to take.

We will then publish our final scheme in a remediation statement, which will detail exactly what is going to happen. A copy of this will be put on the Council’s



Contaminated Land Register.

We will prepare a timetable which we will give to residents and businesses so that everyone can see the programme of works, and this will have a contact name and number on it in case anyone has any queries throughout the work.

If the programme of works is large, for example, is likely to take more than three months, we will arrange another meeting, just over half way through, to give everyone an update. In addition, if changes have to be made to the remediation originally proposed, we will consult with those affected, before the works take place.

Once the works have been completed, the environmental consultants will submit what is known as a 'validation report'. This document will confirm exactly what work was undertaken on site, whether there were any deviations from the original proposed remediation strategy and confirm that all known risks have been minimised. This document will be available for inspection as stated below.

A local authority cannot serve a remediation notice on itself. If this were to become necessary, then instead of a notice, we would have to prepare and publish a 'remediation declaration'. This would include why a particular piece of remediation needed to be carried out and a statement that because the land is Council-owned it could not be the subject of a notice.

Owing to the strict legal requirements governing what is entered on the Contaminated Land Register (see page 11) neither validation reports, nor remediation declarations will be attached to the Register. However of course we will keep records of these documents so that they can be made available on specific enquiry to the Environmental Services office at 37, Pembroke Road London W8 6PW.

## CHAPTER 8

### COST RECOVERY

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If we, the Council, carry out any remediation and we do not own the land, then we are entitled to, and will wherever possible, recover the cost of the remediation that we have undertaken, from the appropriate person(s). This chapter briefly explains how this might work.

General principles of cost recovery from the Council's point of view:

- (a) We will aim for an overall result that is as fair and equitable as possible to all who may have to meet the costs of remediation, including national and local taxpayers;
- (b) We will aim to follow the 'polluter pays' principle, where the costs of remediating pollution are to be borne by the polluter. We will consider the degree and nature of the responsibility of the appropriate person, who created and allowed the conditions to continue, leading to the land in question being identified as contaminated.

We will always seek to recover reasonable costs in full. However, we may reduce the recovery of the costs to avoid any hardship that it may cause to the appropriate person. This will be at the Council's discretion.

In order to promote transparency, fairness and consistency we will be developing a policy statement by the end of 2004, which will outline the general approach we will follow in making cost recovery decisions. It will outline the circumstances in which we would waive or reduce cost recovery (and therefore the circumstances that would prevent us from serving a remediation notice).

Examples of circumstances that will be considered:

- (i) threat of business closure or insolvency;
- (ii) where the appropriate persons includes persons acting as trustees, who would incur liability beyond the assets of the trust;
- (iii) where the appropriate persons are a charity, and;
- (iv) if the appropriate person is eligible for registration as a social housing landlord, or its liability relates to land used for social housing.

These are just a few examples. For more details, please refer to Chapter E of the Statutory Guidance.

Each case will be looked at individually, and inevitably a degree of discretion will be used when applying the policy.

## **GLOSSARY**

For the original statutory definitions refer to: DETR circular 02/2000, Environmental Protection Act 1990: Part IIA, Contaminated Land.

**Class A person** – a person who is an appropriate person because he has caused or knowingly permitted a pollutant (or pollutants) to be in, on or under the land.

**Class B person** – a person who is an appropriate person because he is the owner or occupier of the land in circumstances where no Class A person can be found with respect to that particular remediation action.

**Collective action** – a remediation action which addresses together all of the significant pollutant linkages to which it refers, but which would not have been part of the remediation package for every one of those linkages if each of them had been addressed separately.

**Common action** – a remediation action which addresses together all of the significant pollutant linkages to which it refers and which would have been part of the remediation package for each of those linkages if each of them had been addressed separately.

**Contaminated Land** – any land which appears to the local authority, in whose area it is situated, to be in such a condition, by reason of substances in, or under the land, that, a) significant harm is being caused or there is a significant possibility of such harm being caused, or b) pollution of controlled waters is being, or is likely to be, caused.

**Contaminated land register** – every enforcing authority must maintain a register. This will include details of remediation notices, which have been served, and certain other documents in relation to each area of contaminated land within the authority's boundaries.

**Controlled waters** – defined in section 78A(9) by reference to Part III (section 104) of the Water Resources Act 1991; this is a broad term embracing naturally occurring water bodies such as territorial and coastal waters, inland fresh waters, and ground waters and even ponds. However it does not include sewage and drainage water in sewers.

**Enforcing Authority** – a public body with legal powers and obligations to enforce the provisions of the relevant legislation. In relation to contaminated land, local authorities in England and Wales and the Environment Agency enforce the provisions of the Acts and Regulations that apply.

**Environment Agency** – a separate non-government body (or quango) established in 1995, to protect and improve the environment throughout England and Wales. As the regulator, this Agency is responsible for special sites (see below).

**Orphan linkage** – a significant pollutant linkage for which no appropriate person can be found, or where those who would otherwise be liable are exempted by one of the relevant statutory provisions, e.g. tests outlined on pages 21-22 in Annex Two.

**Pathway** – the means by which a hazardous substance, or agent, comes into contact with a receptor.

**Receptor** – A person, organism, habitat or controlled water that is being, or could be, harmed by a potential pollutant.

**Remediation** – action taken to reduce unacceptable risks caused by contamination. It is distinct from decontamination which implies the complete removal of contaminants.

**Significant harm** - serious harm caused to a specific 'receptor', or receptors, in the case of humans this includes death, injury or disease, and in the case of ecological systems includes irreversible adverse change. Examples of significant harm to other defined

receptors include a substantial reduction in yield (or loss in value) to domestically grown produce, and if it is food then harm that makes it unfit to eat. To be significant, harm to buildings must involve substantial damage, or structural failure.

**Source** – a hazardous substance, or agent (i.e. a contaminant) that is capable of causing harm.

**Special site** – A Special site is contaminated land that poses particular threat to the water environment (including major public water supplies, surface waters and aquifers), also land used for specific purposes (e.g. acid waste tar lagoons, oil refining and explosives manufacture) and land owned by the Ministry of Defence. It also means that the Environment Agency, rather than the local authority, is the enforcing authority for any necessary remediation.

## **BIBLIOGRAPHY AND KEY REFERENCES**

DETR circular 02/2000, Environmental Protection Act 1990: Part IIA, Contaminated Land.

Environment Act 1995, Chapter 25, HMSO.

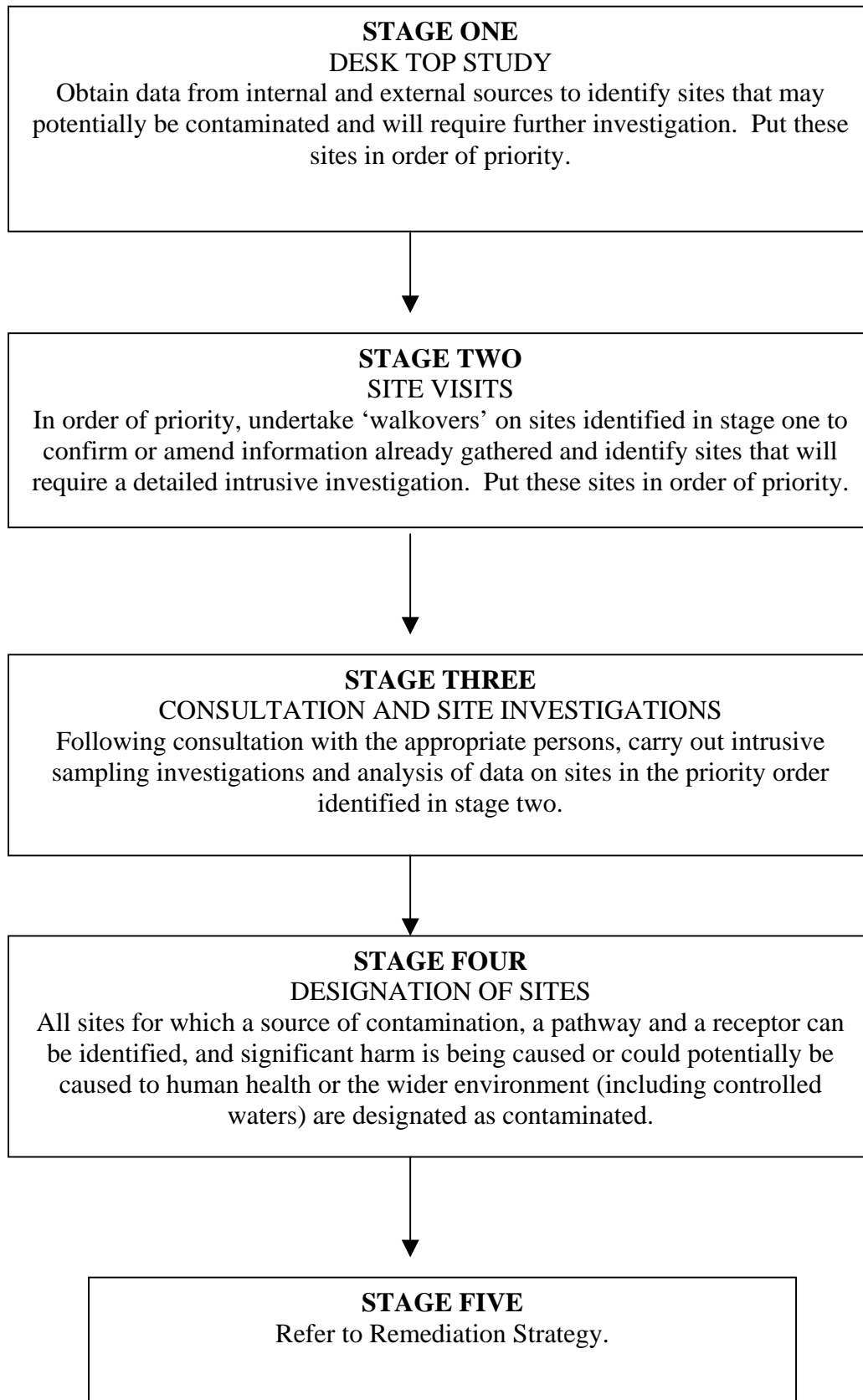
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## ANNEX ONE

### SUMMARY OF STAGES INVOLVED IN IDENTIFYING CONTAMINATED LAND

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## ANNEX TWO

### APPORTIONING LIABILITIES

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This annex provides some guidance on circumstances where two or more persons are liable to bear the responsibility for any particular remediation action. It looks at who should be excluded from liability, and how the cost of each action should be apportioned between those who remain liable after any such exclusion. This is a very complex area and more detailed information can be found in Chapter D of the Statutory Guidance, which should be referred to before making representations to the Council.

As mentioned on page 9, there are five main stages that we, as the enforcing authority, will have to undertake to apportion liability.

#### **First stage - Identify potential appropriate persons and liability groups.**

For a single Significant Pollutant Linkage (below referred to as SPL):

- (i) We will identify all persons who caused or knowingly permitted the pollutant in question to be in, on or under the land. These are known as a 'Class A liability group' for that significant pollutant linkage (SPL) and would be the appropriate persons to pay for remediation.
- (ii) If no Class A persons can be found we will consider whether the SPL relates solely to the pollution of controlled waters, rather than to any significant harm. If this is the case, there will be no liability group for that SPL, and it will be treated as an 'orphan linkage'.
- (iii) In any other case where no Class A person can be found, we will identify the current owners and occupiers of the contaminated land in question. These persons then constitute a 'Class B liability group' for that SPL.
- (iv) If we cannot find any Class A or B persons in respect of that SPL, there will be no liability group for that linkage, and it will be treated as an orphan linkage.

If there are two or more SPLs, we will consider each SPL in turn, carrying out the same steps as above.

- (v) We will then consider if any members of these groups are exempted from liability. This could apply where:
  - A Class B person is exempted from liability arising from the escape of a pollutant from one piece of land to other land; or
  - A person is exempted from liability by virtue of his being a person 'acting in a relevant capacity', such as an insolvency practitioner.

If all members of any liability group benefit from one or more of these exemptions, we will treat the SPL as an orphan linkage. Persons can also be members of more than one liability group, if for example, they caused or knowingly permitted the presence of more than one significant pollutant.

### **Second Stage – Characterise Remediation Actions**

Each remediation action will be carried out to achieve a particular purpose with respect to one or more defined significant pollutant linkages. Where there is only a single significant pollutant linkage, all remediation actions will relate to that linkage so this stage and the third stage would not need to be carried out.

Where there are two or more significant pollutant linkages we will establish whether each remediation action:

- (a) Solely relates to the significant pollutant in a single significant pollutant linkage (a ‘single linkage action’); or
- (b) whether it relates to the significant pollutant in more than one significant pollutant linkage (a ‘shared action’). If it is a shared action we will need to go on to establish whether it is a ‘common action’ (where 2 or more linkages require the same action) or a ‘collective action’ (where a particular action is part of the best combined remediation scheme for two or more linkages).

### **Third stage – attributing responsibility between liability groups**

Where there is only a single significant pollutant linkage, the liability group bears the full cost of carrying out any remediation action. Where the linkage is an orphan linkage, we have the power to carry out the remediation ourselves, though at our own cost.

Where one remediation action is referable to two or more significant pollutant linkages i.e. a shared action (common or collective) we will need to attribute responsibility for the costs of any shared action between the liability groups for the linkages to which it is referable.

For a common action:

- (a) if there is a single Class A liability group, then the full cost of carrying out the common action should be attributed to that group, and no cost should be attributed to any Class B liability group.
- (b) If there are two or more Class A liability groups, then an equal share of the cost of carrying out the common action should be attributed to each of these groups, and no cost should be attributed to any Class B liability group.
- (c) If there is no Class A liability group, and there are two or more Class B liability groups, then we will treat these liability groups as if they formed a single liability group. We will then attribute the cost of carrying out the common action to that combined group and apply the guidance on exclusion and apportionment between all members of the group.

For a collective action:

The difference here is that where costs fall to be divided among several Class A liability groups, instead of being divided equally, as with a common action, we will estimate the costs of the collective action, and the hypothetical cost for each of the liability groups of carrying out the actions which are subsumed by the collective action and which would be necessary if the significant pollutant linkage (SPL) for which that liability group is responsible were to be addressed separately. These estimates are the ‘hypothetical estimates’ of each of the liability groups.

We will then attribute responsibility for the costs of the collective action between the liability groups in the proportions that the hypothetical estimates of each liability group bear to the total of the hypothetical estimates of all the groups.

If any person satisfactorily demonstrates to us, before a remediation notice is served, that the result of an attribution made on the above basis would have the effect of the liability group (of which he is a member) having to bear a liability which is evidently disproportionate, we will reconsider and consult the other appropriate persons concerned.

#### **Fourth stage – excluding members of a liability group**

If either of the liability groups (Class A or B persons) has two or more members, we then have to consider whether any of these should be excluded from liability.

It should be noted that the exclusions have to be re-visited for each significant pollutant linkage. Exclusion in respect of one significant pollutant linkage has no necessary implication in respect to any other linkage. In addition, a person who has been excluded with respect to one linkage may still be liable to meet all or part of the cost of carrying out a remediation action if he is a member of another liability group.

#### **Class A Persons**

For the Class A liability group there are six tests that can be applied, and they must be applied in the order that they are set out. If the result of applying a test would be to exclude all of the remaining members of the liability group, that further test should not be applied, and consequently the related exclusions should not be made.

Any exclusion made under test 1, or 4 to 6 should be to completely remove any liability that falls on the person who has been excluded. All subsequent tests will then be applied as if that person had never been a member of that liability group.

However, for any exclusions made under test 2 or 3, the person who received payment, or bought the land, should bear the liability of the person excluded (the payer or seller) in addition to any liability which he is to bear in respect of his own actions or omissions.

These tests are briefly described below.

#### **Test 1 – ‘Excluded activities’**

The purpose of this test is to exclude those who have been identified as having caused or knowingly permitted the land to be contaminated solely by reason of having carried out certain activities. The activities are ones which, in the Government’s view, carry such limited responsibility that exclusion would be justified even where the activity is held to amount to ‘causing or knowingly permitting’ under Part IIA. It does not imply that carrying out of such activities necessarily amounts to ‘causing or knowingly permitting’. Examples includes providing financial assistance (such as a grant or loan) to another person, underwriting an insurance policy that another person was insured in, or creating a tenancy over the land in question in favour of another person who has subsequently caused or knowingly permitted the presence of the significant pollutant linkage in question.

#### **Test 2 – ‘Payments made for remediation’**

This test is carried out to exclude from liability those who have already, in effect, met



their responsibilities by making certain kinds of payment to some other member of the liability group, which would have been sufficient to pay for adequate remediation.

**Test 3 – ‘Sold with information’**

This test would exclude those who, although they have caused or knowingly permitted the presence of a significant pollutant, they actually disposed of that land in circumstances where it is reasonable that another member of the liability group, who has acquired the land from them, should bear the liability for the remediation of the land.

**Test 4 – ‘Changes to substances’**

This test is carried out to exclude those that caused or knowingly permitted the presence of a substance that has only led to the creation of a significant pollutant linkage because of its interaction with another substance that was later introduced to the land by another person.

**Test 5 – ‘Escaped substances’**

This test would exclude people where the land has become contaminated as a result of the escape of a substance from other land, where it can be shown that another member of the liability group was responsible for the escape.

**Test 6 – ‘Introduction of pathways or receptors’**

This test would exclude those from liability where they would otherwise be liable solely because of the subsequent introduction by others of the relevant pathways or receptors in the significant pollutant linkage.

**Class B Persons**

The purpose of the tests for the Class B liability group is to exclude from liability those who do not have an interest in the capital value of the land in question.

We will therefore exclude any person who either:

- (a) occupies the land under a licence, or other agreement which has no marketable value or which he is not legally able to assign or transfer to another person or;
- (b) is liable to pay rent which is equivalent to the rack rent for such of the land in question as he occupies and holds no beneficial interest in that land other than any tenancy to which such rent relates.

However, the test should not be applied and consequently, no exclusion should be made, if it would result in the exclusion of all the members of the liability group.

**Fifth stage – Apportioning liability between members of a liability group**

In this final stage, we will now determine how any costs that have been attributed to each liability group should be apportioned between the members of that group who remain after any exclusions have been made.

For any liability group which has only a single member remaining, that person bears all of the costs falling to that liability group, that is both the cost of the single-linkage

action referable to the significant pollutant linkage in question, and the share of the cost of any shared action.

For any group with two or more remaining members, further guidance needs to be applied.

### **For Class A persons**

Liability should be apportioned to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused by the significant pollutant linkage in question.

- (i) *Partial applicability of an exclusion test:* if any member of the group was partially excluded as a result of tests 1-6 above, but could not technically be totally excluded, we might reduce the degree of responsibility attributed to that person.
- (ii) *The entry of a substance against its continued presence:* we will consider the extent to which the person, who knowingly permitted the continued presence of the pollutant, had the reasonable opportunity to deal with its presence or reduce the seriousness of the implications of that presence. For example, if he (or she) had the means and opportunity, then he (or she) should bear the same responsibility as the person who caused, or knowingly permitted it.
- (iii) *Persons who have caused or knowingly permitted the entry of a significant pollutant:* If the nature of the remediation indicates that different members of the group were responsible for particular circumstances at which the remediation action is aimed, we will apportion responsibility accordingly. If this is not the case, but the quantity of the significant pollutant present is a major influence of the cost of remediation, we will regard the relative amounts of that pollutant which can be related to the different persons as an appropriate basis for apportioning responsibility. Or again, if this is not the case, and all persons carried out similar activities, we will look at the periods of time for which these activities were carried out.
- (iv) *Persons who have knowingly permitted the continued presence of a pollutant:* in these circumstances we will look at the length of time during which each person controlled the land, the area of land each person controlled and the extent to which each person had the means and reasonable opportunity to deal with the presence of that pollutant in question or to reduce the seriousness of the implications of that presence.
- (v) *Companies and officers:* in accordance with the official guidance, if following the application of the exclusion tests, both a company and one or more of its relevant officers remain as members of the liability group, we will treat the company and its officers as a single unit. Having determined the share of liability falling to both the company and its officers, we shall apportion responsibility between them on a basis that takes into account the degree of personal responsibility of those officers, and the relative resources which may be available to them and to the company to meet the liability.

If none of these can be ascertained, then liability will be distributed equally.

**For Class B persons**

- (a) where the whole or part of a remediation action that a Class B liability group is responsible for clearly relates to a particular area within the land to which the significant pollutant linkage relates, liability for the whole, or the relevant part, of that action should be apportioned amongst those members who own or occupy that particular area of land. If these circumstances do not apply, we will apportion liability amongst all members for that SPL;
- (b) where we are apportioning liability amongst some or all of the members, we will do so in proportion to capital values of the interests of the land in question, which includes those of any buildings or structures on the land. If information is not available to make an assessment of relative capital values (at the date immediately before we served our first notice), we will apportion liability in equal shares among all members of the liability group.